U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street
Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 30 July 2003

CASE NO. 2002-LHC-2132

OWCP NO. 18-68857

In the Matter of:

MANUEL VASQUEZ,
Claimant,

vs.

SAN PEDRO BOAT WORKS,
Employer,

and

FRANK GATES ACCLAIM, INC.,
Carrier.

Appearances:

Robert W. Nizich, Esq.
San Pedro, California

For the Claimant

Alexa A. Socha, Esq.
Long Beach, California

For the Employer and Carrier

BEFORE: ALEXANDER KARST
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

Claimant Manuel Vasquez seeks compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (the Act), for an unscheduled low back injury sustained while working for his employer, San Pedro Boat Works (SPBW), on July 1, 1998. SPBW's insurance carrier is Frank Jones Acclaim. A trial was held on December 2, and 3, 2002, in Long Beach, California. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer and the Carrier. Testimony was taken from Mr. Vasquez and from Respondents' employment expert. Documentary evidence was also submitted by both parties. One exhibit was objected to by Respondents on the grounds that it was an inadmissible statement made in compromise negotiations. I deferred a ruling on the objection until my final decision. Respondents offered post-trial depositions of their medical expert and of two witnesses concerning potential alternate employment. Mr. Vasquez was also deposed post-trial. Post-hearing briefs were authorized and received.

I. Stipulations and Uncontroverted Facts

1. The claim is under the jurisdiction of the Act, and the notice of injury and the filing of the claim were timely.

2. Mr. Vasquez was in an employment relationship with SPBW at the time of the injury.

3. The injury to the low back occurred on July 1, 1998 and this injury was the cause of Mr. Vasquez's disability.

4. Medical and temporary benefits have been properly paid and no additional temporary benefits are claimed.

5. Mr. Vasquez's pre-injury average weekly pay was $592.10, resulting in a compensation rate of $394.74 per week.

6. As Mr. Vasquez cannot return to his usual and customary position as a marine machinist, the disability is permanent.

7. Because SBPW furnished Mr. Vasquez with suitable light-duty employment until September 8, 2000, disability benefits should run from that time.

The primary controverted issues are the extent of Mr. Vasquez's disability, and Respondents' request for relief under Section 8(f).

II. Summary of the Evidence

A. Testimony of Claimant Manuel Vasquez

Mr. Manuel Vasquez is a 64-year-old Mexican American who came to the United States in 1965. TR 24-25.[1] He testified in Spanish at the hearing through the use of an interpreter. He is able to read and understand some English, however, he relies on his wife or an interpreter when accuracy is important. TR 10. Mr. Vasquez testified that he speaks to his children in both Spanish and English but only in Spanish to his wife. TR 64.

Mr. Vasquez worked at Todd Shipyard for 24 years as a welder and burner. TR 25. He also worked at Edison as a welder. TR 26. He worked as a marine machinist from 1994 through the date of injury at San Pedro Boat Works. TR 27. This work was heavy-duty and required him to regularly lift 50 pounds or more. TR 28. On July 1, 1998, Mr. Vasquez sustained injury to his low back while lifting a 150 pound rudder. He immediately felt a sharp pain in the middle section of his low back. TR 32. He went to Kaiser Permanente of Harbor City and was given medication for pain and back spasms. TR 33. He returned to light-duty work at SPBW. TR 34.

On July 27, 1998 he went to see Dr. Robert Smith, who is now deceased. TR 34. The late Dr. Smith was an orthopaedic surgeon in San Pedro, California. CX 19. Dr. Smith examined him, took x-rays and told him that he had a torn disk in his low back. TR 34. Dr. Smith sent him to therapy, and eventually referred him to Dr. Nosrat Navabi, a surgeon. TR 35. In January of 1999, Dr. Navabi performed a lumbar laminectomy on Mr. Vasquez's back. TR 36. After further therapy, Dr. Navabi sent Mr. Vasquez back to work with work restrictions that precluded lifting objects heavier than 30 pounds, climbing ladders, and pushing carts. TR 35; CX 16. Mr. Vasquez performed light duty work where he primarily directed helpers who did the heavier work. TR 37. On September 6, 2000 Mr. Vasquez was laid off from SPBW because as a primarily heavy duty facility, SPBW had insufficient light duty work. TR 37. He has not worked since.

Mr. Vasquez testified that he continues to have sharp pains in his low back, pain that runs down his right leg to his foot and numbness in the toes of his right foot. TR 40. He assessed that he is unable to climb ladders, lift weights over 30 pounds, walk significant distances, run, jump, or stand for eight hours. On cross examination, he added that he could walk one block without rest, sit for two hours and stand for about half an hour. TR 56. He does not believe he is capable of working in any capacity. TR 57. Mr. Vasquez stated that while the surgery did alleviate some of

[1]The following abbreviations for citations to the record shall be utilized herein: "TR" for Volume I of the hearing transcript, "TR2V" for Volume II of the hearing transcript, "CX" for Claimant's exhibits, and "RX" for Respondents' exhibits. The 4 post-trial depositions will be referred to as: "LD" for the deposition of Dr. London; "GD" for the deposition or Mr. Guzman; "JD" for the deposition of Mr. Jones; and "VD" for the post-trial deposition of Mr. Vasquez.

his back pain, and he was happy with his progress after surgery, his back and leg pain had never completely disappeared. TR 42. He believed that the surgery improved his condition by 30 percent and would rate the pain he feels as an eight on a scale of ten. TR 44-45. His pain has worsened since he was laid off. TR 48.

When questioned about his English proficiency, Mr. Vasquez stated that he has been a U.S. resident for over 35 years. TR 50. He attended high school night classes to prepare himself for U.S. citizenship. Those classes were taught in English. He had visited Dr. Smith over 30 times and had always spoken in English. TR 51. There was no interpreter present. He took a six month welding class at San Pedro Skills Center, which was taught in English. While he couldn't understand 100 percent of counsel's questions in English, he could understand some of them. TR 52. Mr. Vasquez communicated with his supervisors at SPBW in English. He had to read mechanical reports, and write short and simple things in English as part of his job. TR 54. He reads the local English-language newspaper. TR 53. He filled out various forms with the assistance of his wife, who is English proficient. TR 55.

B. Medical Evidence

The record contains medical evidence from four different doctors. Dr. Smith was Mr. Vasquez's original physician of choice. Dr. Smith continued to treat Mr. Vasquez until his death in 2002. Dr. Nosrat Nabavi was the surgeon who performed the laminectomy. Mr. Vasquez began seeing Dr. Alan Delman as his physician of choice on July 30, 2002. Dr. James T. London is Respondents' medical expert.

Mr. Vasquez first went to see Dr. Robert Smith, on July 27, 1998. TR 34. Dr. Smith examined him, took x-rays and told him that he had a torn disks in his low back. TR 34. Dr. Smith's first report notes that Mr. Vasquez could bend 30 degrees to the left and right and extend 30 degrees rearward but could only bend froward to within 3 inches of touching his toes. CX 19. Dr. Smith suspected a ruptured disk and ordered an MRI and prescribed Motrin and Darvon for pain. Later, Dr. Smith consulted with Dr. Nabavi concerning possible surgery. CX 17-18. Dr. Nabavi's preoperative examination indicates that Mr. Vasquez could flex 60 degrees forward and extend 30 degrees backward. CX 8. A preoperative MRI of Mr. Vasquez's lumbar spine evaluated the disks between Mr. Vasquez's lumbar vertebrae as follows:

> L 1-2 level demonstrates loss of nucleus pulposus signal density and a 2 mm posterior disk bulge without apparent neural impingement
>
> L 2-3 no evidence of disk degeneration, disk bulge, or central or lateral spinal stenosis
>
> L 3-4 no evidence of disk degeneration, disk bulge, or central or lateral spinal stenosis
>
> L 4-5 there is a 1 cm right-sided herniation compressing the right side of the cal sac ...

The 1 cm disk herniation extends into the right lateral recess impinging upon the right nerve root.

L5-S1 no evidence of disk degeneration, disk bulge, or central or lateral spinal stenosis

RX 8, p. 43. Dr. Nabavi performed the lumbar laminectomy on January 11, 1999. CX 17. After two months of recovery, Dr. Navabi certified that Mr. Vasquez could return to work on April 5, 1999 with restrictions against lifting over 20 pounds, repetitive bending or stooping, and pushing or pulling. CX 16.

Dr. Smith reported on May 20, 1999 that Mr. Vasquez's condition had substantially improved since the surgery. CX 15. His report notes that Mr. Vasquez experiences weakness and numbness in his right leg after working (at his light duty post) for half of a day. He remarked that Mr. Vasquez "is a very dedicated worker." Dr. Smith's January 4, 2000 report shows similar progress. CX 14. He comments that Mr. Vasquez continues to develop pain when he becomes tired form working. Dr. Smith renewed the prescriptions for Darvon and Motrin. In his March 2, 2000 report, diskussing a February 15, 2000 examination, Dr. Smith concluded that Mr. Vasquez's progress had leveled off, that his condition was permanent and stationary, that no further visits were scheduled, and that he was to return on an as-needed basis. CX 12. The report stated that Mr. Vasquez's pain was a 5 on a scale of 10 and that it was 50% better than before his surgery. CX 12. Dr. Smith also noted that Mr. Vasquez was still working and had diskontinued physical therapy, but he stated that Mr. Vasquez was unable to run, jump, lift anything over 30 pounds, or bend to his shoes without pain. CX 12. Dr. Smith again renewed Mr. Vasquez's prescriptions.

In a follow-up report dated July 24, 2000, Dr. Smith indicated that Mr. Vasquez was in constant (90-100% of the time), moderate pain, and that he also has persistent and constant numbness in his fourth and fifth toes of his right foot. CX 11. He notes that, "It is pain that is tolerated but causes a marked handicap in the performance of the activity precipitating the pain." Dr. Smith's report on October 2, 2000 states that "Mr. Vasquez has no permanent work restrictions despite some residual numbness and pain with a variety of activities. He is back at work." He went on to suggest "continued supportive care in the form of anti-inflammatory and mild pain medication such as Darvon." RX 17 at p. 215. Although at the time Dr. Smith felt that "it will not come to repeat surgery," he noted, "for the record, that is a possibility."

After Mr. Vasquez was terminated, he was offered a disability settlement by SPBW's insurance company, Frank Gates Acclaim. Mr. Vasquez had not retained counsel as of that time. Frank Gates's adjuster requested that he be reexamined by Dr. Smith. Mr. Vasquez took the proposal with him for Dr. Smith to review at a February 28, 2002 appointment, which was scheduled at the request of the adjuster. Dr. Smith wrote a letter to Frank Gates Acclaim to correct errors in some of the offer's factual statements concerning Mr. Vasquez's condition. The settlement offer and the letter, submitted as CX 1, were the subject of vigorous objection by Respondents at trial. I deferred decision on its admissibility until my decision. TR 16.

Generally, evidence of conduct or statements made in settlement negotiations is inadmissible. 29 C.F.R. §18.408. However, Dr. Smith was not a party to the negotiation and his independent assessments of Mr. Vasquez's condition are not statements made as part of the negotiations. 29 C.F.R. §18.408 "does not require the exclusion of any evidence otherwise diskoverable merely because it is presented in the course of compromise negotiations." I am going to sustain Respondents' objection to the admissibility of the settlement offer and the doctor's March 5, 2002 letter that addresses it, except for the following excerpt, which is admitted:

> In my opinion, the patient is permanent and stationary, totally incapacitated for his usual and customary work. The patient is 62 years old. He is now on Social Security. The physical examination of the patient reveals no improvement over his previous physical examination. The surgery did initially relieve some of his diskomfort but not completely. At the present time, he has pain continuously and it is considered moderate increasing to severe with any serious heavy activity.
>
> My recommendation is the patient be placed on lifetime medical and lifetime disability.

CX 1, ¶¶ 1-3.

After Dr. Smith's death, which occurred sometime between March and July of 2002, Mr. Vasquez began treating with Dr. Alan Delman. CX 6. Dr. Delman's August 2002 report notes that he performed a full physical examination consisting of range of motion testing, gait observation, leg raises, knee, and ankle jerks. He measured Mr. Vasquez's forward flexion at 80 degrees, his rear extension at 15 degrees, his left bend at 15 degrees and his right bend at 25 degrees. CX 6. Dr. Delman diagnosed Mr. Vasquez as having "[r]ight lumbosacral radiculopathy with lumbosacral spondylosis and disk degeneration." CX 6. He noted that Mr. Vasquez improved following surgery, but that he developed recurrent pain, including low back pain and right lower extremity pain and numbness. CX 6. He recommended further evaluation and an MRI scan of the lumbosacral spine. Mr. Vasquez testified that Dr. Delman had suggested fusion surgery, an option Mr. Vasquez declined to take. In lieu of surgery, Dr. Delman was administering cortisone injections. TR 40. An MRI of Mr. Vasquez's spine taken on August 12, 2002 revealed the following:

> L 1-2 there is loss of nucleus pulposus signal intensity and a 3 mm posterior disk bulge without central or lateral spinal stenosis
>
> L 2-3 there is partial loss of nucleus pulposus signal intensity and a 2mm posterior disk bulge. There is mild bilateral facet hypertrophy. There is no central or lateral spinal stenosis

> L 3-4 there is mild bilateral facet hypertrophy. There is mild central canal narrowing and bilateral neural foraminal narrowing which is slight on the right and mild on the left.
>
> L 4-5 there is severe disk space narrowing. There is loss of nucleus pulposus signal intensity and a 2 cm disk bulge as well as moderate bilateral facet hypertrophy. There is a right laminectomy defect noted. There is bilateral neural faraminal narrowing which is mild on the left and moderate on the right.
>
> L5-S1 there is loss of nucleus pulposus signal intensity and a 3 mm posterior disk bulge without central or lateral spinal stenosis.

RX 8, p. 41. There are no additional reports from Dr. Delman in the record.

Dr. James T. London, a board-certified orthopaedic surgeon in San Pedro, California, was retained by Respondents to examine Mr. Vasquez. RX 7; RX 21. Dr. London examined Mr. Vasquez on April 10, 2002 and September 25, 2002. RX 7. In his review of Mr. Vasquez's medical records with Dr. Smith, Dr. London noted that Dr. Smith's report of October 2, 2000, provided no permanent work restrictions despite some residual numbness and pain with a variety of activities. RX 7, p. 38. Based on the record review and a physical examination, Dr. London concluded that Mr. Vasquez had a permanent disability that would preclude lifting or carrying loads over 30 pounds, forceful pushing or pulling, and repetitive bending or stooping. RX 7, p. 39. In Dr. London's subsequent report, dated October 2, 2002, he indicated that Mr. Vasquez stated that he underwent the MRI scan recommended by Dr. Delman on August 12, 2002. RX 7, p. 22. His diagnosis and work restrictions for Mr. Vasquez remained unchanged from his initial report dated April 16, 2002. RX 7, p. 28.

At a post-trial deposition, Dr. London elaborated on the work restrictions. He testified that Mr. Vasquez could not return to his pre-injury work as a marine machinist and that the work restrictions given Mr. Vasquez were "prophylactic restrictions intended to keep [Mr. Vasquez] from injuring himself or exacerbating his condition, particularly if they were performed under a repetitive task." LD 8. He added that he believed Mr. Vasquez would be physically capable of carrying 50 pounds up two flights of stairs as long as it was not on an ongoing basis, such as every hour or several times a shift. LD 8. He testified that Mr. Vasquez would not need restrictions regarding ladder climbing, stair climbing, walking, standing, sitting, or driving, but that he would prophylactically preclude him from running with any regularity. LD 6-7, 16. He stated that he thought that Mr. Vasquez could return to light duty work, but not to his usual and customary position prior to his injury. LD 12-13. Dr. London stated that in his opinion, assuming job responsibilities as defined by the materials provided to him by vocational expert Paul Johnson, Mr. Vasquez could perform the duties of lobby ambassador. LD 14. When pressed about specific qualifications, Dr. London added that "I think he would have the capability of

defending himself, but not subduing somebody else." LD 15. Dr. London also testified that his notes do not reflect that Mr. Vasquez utilized an interpreter at his first examination when it is his customary practice to record the use of an interpreter and take the interpreter's business card. LD 9.

C. The Testimony and Report of the Vocational Expert

Mr. Paul Johnson, a vocational rehabilitation expert no longer certified by the Department of Labor, was retained by Respondents to perform vocational testing on Mr. Vasquez to determine the availability of suitable alternative employment. TR2V 19. He testified that he works out of his home in Vacaville, California and that he believes he was referred Mr. Vasquez's case February 25, 2002. TR2V 11-12. I take judicial notice of the fact that Vacaville, which is north of San Francisco and is roughly 435 miles, a nine to ten hour drive, from the Long Beach/San Pedro area. Mr. Vasquez was unrepresented when he met with Mr. Johnson in mid-April of 2002. TR2V 12. Prior to the meeting, Mr. Johnson reviewed medical reports from Dr. Nabavi, Dr. London, and Dr. Smith, and Mr. Vasquez's physical therapy records. TR2V 13. During the interview, he learned that Mr. Vasquez had a 6th grade education which he obtained in Mexico, that he has lived and worked in the United States nearly continuously for 37 years since 1965, that he took three years of night school to learn English, that he was able to read in English previous job reports and the local San Pedro newspaper, that he received verbal work instructions in English, that he took a 6-month welding course taught in English, and that he watched both English and Spanish television and movies. RX 16, p. 146. Based on the above, Mr. Johnson concluded that Mr. Vasquez demonstrated a rudimentary ability to speak and comprehend basic verbal English at a fourth to sixth grade level. RX 16, p. 147. His Labor Market Survey and Job Analysis report, dated October 29, 2002 was performed after his meeting with Mr. Vasquez. TR2V 15, 19; RX 16. Based upon Mr. Vasquez's medical reports, age, education, vocational testing results, and work history, Mr. Johnson concluded that Mr. Vasquez could find suitable alternative employment in his local labor market as a lobby ambassador or security guard. RX 16, p. 150. He testified that both jobs are essentially the same except that lobby ambassadors wear a blazer, tie, and slacks, while unarmed security guards wear a uniform. TR2V 32.

Mr. Johnson's survey includes an assessment of the physical and mental requirements of both jobs. RX 16, p. 174. Unarmed security guards "serve as 'in absentia eyes and ears' for company officials." They primarily "observe and report" on occurrences at their post. Security guards "record such data as property damage, unusual incidents and malfunctioning of equipment or machinery." They can sit or stand at their own diskretion. They must walk occasionally or intermittently when patrolling. RX 16, p. 176. "They ***DO NOT confront unauthorized persons or fight fires***, but rather sound and alarm and/or alert" to appropriate responders (emphasis in original). The heaviest objects they are required to lift are a flashlight and a set of keys each weighing about five and a half pounds. RX 16, p. 177. They occasionally and intermittently push or pull doors, gates, and windows, climb stairs, stoop, and reach. RX 16, p. 177. The requirements for lobby ambassador are essentially the same. RX 16, pp. 182-188.

Mr. Johnson identified several lobby ambassador and unarmed security guard positions available to Mr. Vasquez with Universal Protection Services (UPS), Pinkerton Security, and GHG Security, ranging in pay from $8.00 to $12.00 per hour. RX 16. Mr. Johnson's list of possible positions for alternate employment consists of 22 pages of listings. Each includes a textual description of the job. These descriptions were written by Mr. Johnson. TR2V 31. Each listing stated that "when informed of Mr. Vasquez's age, education, background, and medical status, this employer stated that they would have interviewed him for this position had he applied." There were 40 listings for UPS. RX 16. The only variance in each listing was the date available and the Orange County city which the company was recruiting for. The are two listings for Pinkerton that bear similar descriptions while the one listing for GHG has a description virtually identical to the UPS listings. RX 16. Mr. Johnson could not verify the exact geographical location of many of the jobs because the employers in his survey were all "hiring halls" that provide outsourced security services. TR2V 40-42. Mr. Vasquez introduced a survey from another injured worker where Johnson listed almost exactly the same jobs. CX 24.

Mr. Johnson stated that he contacted Pinkerton on 2/10/02 and 3/17/02 and was informed that unarmed security guard positions paying $10 per hour were available on those dates. TR2V 24. However, he admitted that he contacted these employers while working on "other cases." TR2V 25. He followed up by stating that he refers to these jobs repeatedly and thus knows what the physical demands are with respect to Mr. Vasquez. TR2V 26. He added that he again contacted Pinkerton a couple days prior to October 29, 2002 to see if the jobs were still available. TR2V 26.

Mr. Vasquez's attorney attempted to rebut Johnson's assessment that Mr. Vasquez could perform the duties of lobby attendant or unarmed security guard. In turn, he asked Mr. Johnson if Mr. Vasquez could expect to be hired if he could not walk or stand for an entire shift, run, carry 50 pounds, climb ladders and defend himself. TR2V 34. Johnson responded to each question by saying that he "wouldn't have him assigned to that kind of job." Mr. Vasquez's attorney then produced a job application from UPS that listed "Conditions of Employment" at UPS. These conditions included:

> [You must] be capable of performing the essential functions of the job (with or without reasonable accommodation), including, but not limited to: standing or walking for an entire shift, climbing stairs or ladders, lifting of carrying up to 50 lbs., running, and self-defense.

CX 23[2]. Mr. Johnson replied that these conditions had to be read in light of the "reasonable accommodation" statement, which "made all of the things that came after it moot." TR2V 36. He professed that his qualification as a "Senior Professional in Human Resources" made him an expert in employment law and the Americans with Disabilities Act (ADA). TR2V 61. He said that the law required not diskriminating against disabled workers. He added, "The reason that these employers ... found their way into my report is because these employers have consistently ... demonstrated to me in telephone conversations and in documentation that I've obtained about their hiring processes that they are aware of their obligations under the law and that they do everything they can to meet those obligations." TR2V 62.

On December 9, 2002, a week after the trial, Mr. Vasquez went to UPS and filled out an application. CX 25. He was accompanied by Mr. Kristo Jelenic, who also is seeking compensation under the Act and who has the same attorney as Mr. Vasquez. He had a fifteen minute interview with Mr. Edward Guzman. What transpired in this interview is the subject of some dispute. Mr. Guzman claims that he offered a part-time job to Mr. Vasquez. GD 11-12. Mr. Vasquez claims that this is untrue. VD 6.

D. The Post-Trial Depositions of UPS Employees

Respondents took post-trial depositions show that Mr. Vasquez was, in fact, offered a job at UPS and to show that UPS would reasonably accommodate Mr. Vasquez. They deposed Mr. Guzman and Mr. Robert Jones, UPS's Human Resources Coordinator. Mr. Guzman testified that he was the operations manager for the Santa Anna branch of UPS, and that he did all of the hiring for that branch. GD 7. He said that on December 9, 2002, Mr. Vasquez came into his office an filled out an application. GD 11-12. Mr. Vasquez told him that he wanted a light duty job, and that Mr. Johnson had told him to come to UPS to apply. GD 9, 30. Mr. Guzman said that after a short interview, he offered Mr. Vasquez a position as a security guard for 24 hours per week at $8.50 per hour. GD 12. The position was in La Habra, California. Mr. Guzman stated that he had never met with Mr. Johnson or with Respondents' attorneys prior to interviewing Mr. Vasquez's application. GD 13, 14.

Mr. Guzman went on to testify that UPS made reasonable accommodations to handicapped workers. GD 17. He stated that a handicapped worker would not necessarily have to be able to do all of the tasks listed in the conditions of employment. GD 18. Because different types of posts were available, UPS could try to tailor the post to the specific needs of the employee. GD 18. Mr. Guzman diskussed a Preemployment Medical History form that is given to all new employees after they are hired. GD 20, RX 22. The form allows employees to "share information with [UPS] as if they have a certain condition that they have, we need to be aware

[2]The Condition of Employment also require drug testing. There is no information in the record whether Mr. Vasquez's continued use of Darvon, a mild narcotic analgesic chemically similar to methadone, prescribed to alleviate his back pain, would violate UPS's drug policy, or if the side effects would make Mr. Vasquez an inappropriate employee. *See* Physicians' Desk Reference 1909 (American Medical Association, 56th ed. 2002).

that we have to provide these so-called call [sic] reasonable accommodation." GD 21. The form include questions about back and neck injuries. RX 22.

Mr. Guzman opined that "self-defense" as required by the Conditions of Employment meant "that in your own means that you would do anything to protect yourself from any type of bodily harm when they are coming at you" and added that "throwing your hands in front of your face" would count "if that's what their self defense mechanism is." GD 19. He clarified that the position did not require employees to subdue attackers or fight fires. GD 19.

On cross Mr. Guzman reiterated that he had offered a job to Mr. Vasquez, and said that since then, UPS had not offered Mr. Vasquez another position. GD 27. Mr. Guzman testified that in a typical week his office had form 100 to 160 hours available to be filled. GD 28. Mr. Guzman was questioned about whether he thought Mr. Vasquez could speak and write English well enough to fill out incident reports, and about the notes he took while interviewing Mr. Vasquez. GD 29- 30. In the interview, Mr. Guzman asked Mr. Vasquez, "What is it about the security industry that interests you?" The exchange from the deposition transcript about Mr. Vasquez's response reads:

> A. He told me that he was told by Paul Johnson that this was a light duty job.
>
> Q. Can you please read exactly what it says.
>
> A. "Was told by Paul Johnson m-a-s-p-h-r this was a light duty job."[3]
>
> Q. Is that exactly what he said to you exactly those words?
>
> A. No. That's probably my summation. I interpreted what he said. That's my own interpretation.
>
> Q. How did you interpret Paul Johnson m-a-s-p-h-r when you met with him?
>
> A. I don't recall exactly – what it is he told me. I was confused when he told me that; so I wrote down what I could gather what he was trying to tell me.
>
> Q. Well, had you ever met with Mr. Johnson before this?
>
> A. No.
>
> Q. So you wouldn't know that Paul Johnson m-a-s-p-h-r may be some kind of qualification he has?
>
> A. No, I have no idea what that is.

[3]The document reads, in Mr. Guzman's hand, "Paul Johnson M.A. SPHR" CX 25.

Q. And you are saying that Mr. Vasquez came in and said "Paul Johnson m-a-s-p-h-r told me this was a light duty job"?

A. I don't know if that's what he said. I don't recall if that's what he said or not.

GD 30-31.

Mr. Guzman answered several more questions about Mr. Vasquez's answers to interview questions, including a portion of the application which asked the applicant, "In this ten-minute period, take ten minutes to compose an informal report detailing anything you may have observed while waiting." In response, Mr. Vasquez wrote a single word – "perfect." GD 39, CX 25. Mr. Guzman admitted that he had never personally offered reasonable accommodation to any of the approximately one hundred employees in his division. GD 39.

Mr. Guzman testified that he was present at a pre-deposition meeting, which ostensibly occurred after Mr. Vasquez applied for a position at UPS. Present were Mr. Guzman, Respondents' counsel, Mr. Johnson, and Mr. Robert Jones, UPS's Human Resources Coordinator. GD 39. Mr. Guzman admitted that Mr. Johnson informed him that the "reasonable accommodation" language on UPS's Conditions of Employment came directly from the ADA but said that he couldn't recall most of the substance of the conversation, because Mr. Johnson was primarily speaking with Mr. Jones. GD 40.

Mr. Guzman stated that to his knowledge, he had never hired any of the 25 potential employees referred to UPS by Mr. Johnson. GD 41. He went on to testify that while he could accommodate some of Mr. Vasquez's limitations individually, "the less they can do, the harder it will be to accommodate somebody." GD 43. He testified that ability to write English was a requirement, but that routine reports could be written out in simple language, while incident reports required greater specificity, although a field supervisor could assist in filling out an incident report. GD 46, 47, 50. Further, Mr. Guzman testified that most of the job listings utilized by Mr. Johnson in preparing his employment survey were posted by Mr. Raymond Chavez, an outside recruiter whose primary purpose is to maximize applications to UPS. GD 48. While Mr. Johnson's employment survey stated, "Raymond expressed a willingness to have interviewed an individual of Mr. Vasquez's age, education, background, and medical status ... ," according to Mr. Guzman, Mr. Chavez does no interviewing for UPS and has no role in the hiring process. GD 48. Mr. Guzman added that the ten dollars per hour salary stated in those job listings would not apply to an applicant with no security experience, and that seven to nine dollars would be a better estimate. GD 51.

Respondents also deposed Mr. Robert Jones, the Human Resources coordinator at UPS. Mr. Jones does not interview or otherwise individually assess potential UPS employees, and he has never met Mr. Vasquez, and knows very little about him or his medical condition. JD 7, 18-19. He testified that inability to perform one or more or the duties listed in the Conditions of Employment would not necessarily disqualify a potential employee. JD 7. He added that UPS currently employs a part-time patrolman who has Parkinson's disease and a dispatcher who uses a

cane to walk. JD 8. UPS provided the dispatcher with a special chair to accommodate his disability. JD 9. UPS also employs individuals over 70 years old, and a patrolman who has an unspecified workers' compensation claim pending, who works in a position where no lifting is required. JD 9.

Mr. Jones described the self-defense requirements of the Conditions of Employment. He explained "all our officers are not here to go out and look for trouble, but ... if you were attacked by someone, we have the right to defend ourselves, and that would be any employee we have, he or she, be – have the ability to defend themselves or the people we're responsible for." JD 9-10. As an example he added, "[I]f I was escorting you to your car in the evening, which we do, and someone was to attack you, it would be my job to try to get that individual off of you. If I know martial arts or not, that has nothing to do with it. It's just the fact of being able to defend yourself." GD 9. Mr. Jones went on to testify that, in turn, inability to run, climb ladders, fight fires, and carry 50 pounds would not necessarily disqualify an applicant. JD 12-13.

Mr. Jones testified that UPS employs lobby ambassadors who speak English as a second language, although those employees write their reports in English, and that some of UPS's lobby ambassadors are 60 years of age. JD 13, 15, 21. He also noted that reports were to be filled out, in English, "[a]s detailed as humanly possible," although perfect spelling and grammar are not necessary. JD 15. Mr. Jones then described the preemployment medical screening process. JD 15. His description is identical to Mr. Guzman's.

On cross examination, Mr. Jones admitted that he had met with Mr. Johnson once and said that "we may have had five or six words between the two of us." JD 17. Mr. Jones testified that the ADA was never diskussed. When confronted with Mr. Guzman's testimony from the prior deposition, Mr. Jones explained, "[I]f you're speaking to this young man being in the conversation when I was talking to [Respondents'] attorneys, yes, but me having a one-on-one with this young man, no, I did not." JD 17. When Mr. Vasquez's attorney pressed Mr. Jones he became confused and couldn't recall details of the conversation. JD 18. He also testified that he could not recall whether Mr. Johnson, or Respondents' counsel had informed him that the "reasonable accommodation" language on the Conditions of Employment came directly from the ADA. JD 23. Mr. Jones also said that he was not qualified to answer specific questions about the pre-employment screening process or the questions on the pre-employment medical history form, explaining that those questions should be addressed to UPS's Human Resources Director. JD 20-21.

E. The Post-Trial Deposition of Mr. Vasquez

Mr. Vasquez was deposed two weeks later. He testified that he went to UPS sometime in December of 2002 and that he had met with Mr. Guzman for fifteen minutes. VD 6. He categorically denied that Mr. Guzman had offered him a job as a lobby ambassador in La Habra paying $7.50 per hour. VD 7. Mr. Vasquez said that he told Guzman of his operation and his inability to lift more than 30 pounds, and was told that "there was no work for me" with the Santa

Anna office of UPS. VD 7, 16. Mr. Vasquez claimed that Mr. Guzman told him that he had to be able "to lift 50 pounds and an extinguisher in case of a fire." VD 7. Mr. Guzman told him that he would send his application to UPS's Long Beach office, which is significantly closer to Mr. Vasquez's home, but added that he did not know if there were positions there that could accommodate Mr. Vasquez's restrictions. VD 8, 17. Mr. Vasquez testified that he never followed up with the Long Beach office because he didn't think he was qualified for the job. VD 8, 17. Mr. Vasquez stated that he has never been contacted by either the Santa Anna or the Long Beach Office of UPS with an employment offer. VD 8.

Mr. Vasquez was further questioned on his English ability. He stated that Mr. Johnson had tested him on his ability to write English. VD 8. He identified a medical form offered into evidence by Respondents and explained that the form was filled out by the secretary at Kaiser Permanente and by his wife, on whom he relies because "[s]he understands better than I do." VD 9. He spoke in English to Dr. Smith, but also spoke in Spanish to Dr. Smith's secretaries who interpreted. VD 10. His wife accompanied him to meetings at the Department of Labor to assist him in understanding. VD 10. On cross examination, he was presented with another form, where he stated that he had filled out his name, job title, the location, hours and pay of his job at SPBW, the date and circumstances of his injury, and the type of operation he had on his back. VD 22. He said that he had copied "lumbar laminectomy" from a pamphlet given to him at the time of his surgery. VD 23.

On cross examination, Respondents established that Mr. Vasquez had gone to UPS one time prior to his interview with Mr. Guzman, but left without filling out an application because he felt that he did not meet the conditions of employment. VD 11-13. Mr. Vasquez went to UPS a second time, at the direction of his attorney. VD 13. Both times, Mr. Vasquez was accompanied to UPS by Mr. Christo Jelenic, another longshore compensation claimant represented by Mr. Vasquez's attorney. VD 14. Mr. Vasquez admitted that Mr. Jelenic was also Mr. Vasquez's first boss at SPBW, that he had know him for five years, but that he had not seen him since being laid off. VD 15.

Mr. Vasquez admitted that he didn't really want to work for UPS because, "[s]ecurity work is very risky." VD 18. He testified that other than going to UPS at the direction of his attorney, he had not looked for work at all. VD 19. He also clarified that while he may have mistakenly checked "employee" as the source of his referral to UPS, he did not know anyone employed there. VD 19. Mr. Vasquez testified that he told Mr. Guzman that he had been referred by Mr. Johnson, and that he gave Johnson's name and address to Guzman. He also stated that he may have had Mr. Johnson's employment survey with him during the interview. VD 20.

III. Analysis

A. The Extent of the Disability

The Act classifies disabilities in two ways, by nature (permanent or temporary) and by extent (total or partial). 33 U.S.C. §908(a), (b), (c), (e). While Respondents contest the specific date on which Mr. Vasquez's disability became permanent, both parties agree that he was permanently disabled at the time of his termination from SPBW on September 6, 2000, which is the date any benefits would begin to accrue. Therefore, I find that Mr. Vasquez is permanently disabled. The central issue in this case concerns whether Mr. Vasquez's permanent disability is total or partial. In order to arrive at a decision in this matter, it is necessary to determine the credibility of the witnesses, to weigh the evidence and draw inferences from it. *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 165-167 (1989); *Anderson v. Todd Shipyard Corp.*, 22 BRBS 20, 22 (1989).

The Act puts the initial burden on the claimant to make a *prima facie* showing that he cannot return to his usual and customary work at the time of his injury. *Elliot v. C & P Tel. Co.*, 16 BRBS 89 (1984). There is no dispute that Mr. Vasquez cannot perform his pre-injury job duties at SPBW – Respondents concede the issue in their brief. Respondents' Post-Trial Brief at 7. A claimant who cannot return to his usual and customary work is entitled to a presumption that his disability is total. *Walker v. Sun Shipbuilding & Dry Dock Co.* (*Walker II*), 19 BRBS 171 (1986). In order to rebut the presumption of total disability, the employer must "show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried." *Hansen v. Container Stevedoring Company*, 31 BRBS 155 (1997); *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327, 12 BRBS 660 (9th Cir. 1980).

After his injury, when not medically unable to work, Mr. Vasquez performed light duty work at SPBW until that work was no longer available. During that time, this light duty work constituted suitable alternate employment. Since Mr. Vasquez was laid off for reasons unrelated to any actions on his part, and he remains unable to return to his pre-injury duties, SBPW must show the availability of new suitable job opportunities in order to establish partial disability from the time of his termination. *Vasquez v. Continental Maritime*, 23 BRBS 428 (1990); *Menendez v. National Steel and Shipbuilding Company*, 21 BRBS 22 (1988).

Two essential questions must be answered in determining the suitability and availability of alternative employment. "First, following his injury, what can the claimant physically and mentally accomplish in relationship to job requirements? ... Second, after the jobs the claimant is reasonably capable of performing have been identified, are there such jobs reasonably available in the community which the claimant could realistically obtain?" *Bess v. SEACO*, 32 BRBS 378, 385 (ALJ) (1998); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).

The physicians whose views are in evidence agree that Mr. Vasquez should avoid forceful pushing or pulling, repetitive bending or stooping, and lifting over 30 pounds. There appears to be an agreement that he is probably incapable of defending another person. There is, however, disagreement as to whether Mr. Vasquez can remain either seated or on his feet for significant periods of time, whether he can walk without resting after a short distance, and whether he can jump or climb ladders.

Mr. Vasquez has consistently complained to his doctors about pain in his low back that extends down his right leg, and numbness in the toes of his right foot. CX 11, 12, 14; RX 8, 17. He complained that this pain become worse as he became tired from his light duty work at SPBW. RX 14. I find Mr. Vasquez's testimony on this matter credible. *Eller & Co. v. Golden*, 8 BRBS 846 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980).

There is also sufficient evidence to show that while Mr. Vasquez's condition was generally improved by the surgery, it has since deteriorated. The most recent range-and-motion tests performed by Dr. Delman show a decline in flexibility when compared even with tests performed by Dr. Navabi *prior to the surgery*. The methodology used in these tests insures a fair degree of accuracy[4]. Further, the August 12, 2002 MRI shows deterioration and additional bulging in several disks when compared with the pre-operative MRI taken in 1998. These objective facts give weight to Dr. Smith's assessment that the surgery did not completely alleviate Mr. Vasquez's back problems, and that Mr. Vasquez is in constant moderate pain that increases with heavy activity.

The parties disagree whether Mr. Vasquez meets the primary mental requirement of all of the suggested positions, namely his ability to speak, read, and write in English. From the fact that English is his primary language at work and when conversing with his adult children, it would appear that Mr. Vasquez speaks English reasonably well. It is, however, understandable that a person would desire to use a translator when in a legal proceeding where accuracy is of great importance. It was established that he reads the local San Pedro English-language newspaper. Mr. Johnson's survey assessed Mr. Vasquez's language ability at a fourth to sixth grade level. Aside from a series of mostly single word answers on forms, there is no evidence either way of Mr. Vasquez's ability to write in English. I find that Mr. Vasquez speaks English well enough to hold most unskilled jobs. He can give and receive instructions in English. I also believe that he can write, but to a rather limited degree.

On balance, I conclude that Mr. Vasquez would cannot lift more than 30 pounds, repetitively bend or stoop, or push or pull with more than minimal force. He is not capable of physically defending others. Further, while Mr. Vasquez can perform a job that requires some degree of standing or walking, he is incapable of being on his feet for a substantial part of a shift.

---

[4]Flexion, extension, and lateral bending tests are verified by leg lifting measurements. Most efforts to "fake" an injury result in inconsistent measurements. *See* American Medical Association, Guides to the Evaluation of Permanent Impairment 406 (5th ed. 2001).

He could hold a job where he is expected to generally communicate with people in simple English, but he would be unsuitable for a position which requires any significant amount of narrative or grammatical writing. Finally, apart from welding or machining, in which he has training and experience, I find that any work requiring prior training or special knowledge would not be suitable for him.

Based on the testimony of employment expert Paul Johnson, Respondents assert that Mr. Vasquez could perform the work of an unarmed security guard or lobby ambassador. Assuming that the duties of those positions are those described in Mr. Johnson's survey, I agree that it is possible that Mr. Vasquez could hold some jobs of this sort. However, within the range of jobs with those titles, there are also a number of jobs that would be inappropriate for Mr. Vasquez, namely those that require constant standing, frequent patrolling on multiple floors of a building, or the defense of others.

Having established what would be suitable work for Mr. Vasquez, Respondents must show that work of this type is available in the vicinity of his residence, and that he could obtain it if he diligently tried. Although the employer is not required to act as an employment service for the claimant and actually place him in a job, the precise nature, terms, and actual availability of these positions must be shown. *Thompson v. Lockheed Shipbuilding and Construction Company*, 21 BRBS 94 (1988), *Bumble Bee Seafoods v. Director, OWCP,* 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980).

If the employer can show that a claimant was actually offered a position, its has met its burden. *Shiver v. United States Marine Corp, Marine Base Exch.*, 23 BRBS 246 (1990). Respondents allege that Mr. Guzman offered Mr. Vasquez a part-time position as a lobby ambassador in La Habra, a claim that Mr. Vasquez categorically denies. I find Mr. Vasquez's testimony to be more credible in this matter. The depositions of the UPS employees contain contradictions. Both offered confused or evasive responses when questioned about a meeting they attended along with Mr. Johnson and Respondents' attorneys. There is some evidence that Mr. Guzman did not tell the truth when he said that he never met Mr. Johnson prior to Mr. Vasquez's application at UPS. Therefore, I credit Mr. Vasquez's testimony and find that he was not offered a position at UPS.

In determining the suitability of other employment possibilities, I must compare the claimant's physical and mental limitations, based on the medical opinions of record, with the requirements of specific available jobs identified by the employer. *Villasenor v. Marine Maintenance Industries*, 17 BRBS 99 (1985). Dr. London testified that Mr. Vasquez could perform the duties of a lobby ambassador. What is problematic here is that the job requirements offered by Mr. Johnson in the employment survey, which form the basis of Dr. London's opinion, differ from the "Conditions of Employment" listed on UPS's application. A job requiring "standing or walking for an entire shift, climbing stairs or ladders, lifting or carrying up to 50 lbs., running, and self-defense" would not be appropriate for Mr. Vasquez.

Contrary to the legal analysis of Mr. Johnson, the reasonable accommodation provisions of the ADA would not make all of UPS's job requirements moot. It is true that the ADA requires employers to reasonably accommodate the disabilities of employees and applicants who are otherwise qualified. 42 U.S.C. §12112(b)(5)(A), (B). However, if a potential employee's disability makes him physically unable to perform essential tasks of the job, with or without reasonable accommodation, he is not an "otherwise qualified individual with a disability" protected under the ADA. *See e.g. Burch v. City of Nacogdoches*, 174 F.3d 615 (5th Cir. 1999) (No reasonable accommodation could be made to firefighter whose back injury made him unable to fight fires.).

While it is possible that UPS has positions which could reasonably accommodate Mr. Vasquez's disability, the generic quality of Mr. Johnson's testimony and the description of his research about employment prospects makes this determination impossible. The employer bears the burden of identifying specific available jobs; labor market surveys alone are insufficient. *Campbell v. Lykes Bros. Steamship Co.*, 15 BRBS 380, 384 (1983). Of the 43 positions listed in the survey, 40 are advertisements listed by a single contracted recruiter, Raymond Chavez. Mr. Guzman's testimony established that Mr. Chavez's primary purpose is to maximize applications to UPS, and that he makes no decisions concerning actual employment. Mr. Johnson admitted that he could not tie individual job locations or specific job duties to any of the advertisements, and that all of the listings referred to a single 1-800 number that was basically a recruiting clearinghouse for all of Southern California. Further, the job descriptions accompanying these listings in the survey were not provided by the prospective employers–they were written by Mr. Johnson.

The lack of specific jobs at UPS able to accommodate Mr. Vasquez was further supported by the testimony of Messrs. Guzman and Jones. Their testimony established that Mr. Vasquez would not be suitable for *all* of these supposed openings, and while it is possible that he might qualify for *some* of them, Guzman and Jones were at a loss to name specific positions. It is true that both testified that UPS could accommodate disabled employees. Both testified that UPS could try to tailor a post to the specific needs of the employee. Mr. Guzman testified that his office had from 100 to 160 hours available in any given week. He did not testify as to how those hours were broken up, what locations they were at, the job duties of the positions they represented, or give any other specific information. Other than the uncredited La Habra offer, neither mentioned any specific available post that Mr. Vasquez would qualify to fill.

The remaining three positions listed in the labor market survey also lack sufficient specificity. The survey states, for each of these entries, that "when informed of Mr. Vasquez's age, education, background, and medical status, this employer stated that they would have interviewed him for this position had he applied." This would seem to indicate that specific positions willing and able to accommodate Mr. Vasquez were available. However, Mr. Johnson admitted that he didn't call these employers for Mr. Vasquez's case. The willingness of these employers to hire a person of Mr. Vasquez's characteristics is Mr. Johnson's speculation.

As Mr. Johnson did not research the positions listed in the employment survey *as they pertain to Mr. Vasquez's case*, the listed jobs offer little more than a culling of classified advertisements. Absent more specific information, a classified advertisement in a newspaper is insufficient to establish the nature, terms, and actual availability of any specific position. *Manigault v. Stevens Shipping Company*, 22 BRBS 332 (1989). This is even more true in the case of employment agencies and labor subcontractors, which tend to cast a wide net to maximize their pool of applicants and to solicit general applications as opposed to applications for specific assignments. While advertisements of this type establish that these "hiring halls" are accepting applications, they offer no specific information about the endpoint work the applicant will be expected to do. In his testimony, Mr. Johnson accounts for the lack of specificity by explaining that companies keep more specific information about individual placements secret to avoid competition for other security providers. TR2V 40. While this may be true, it does nothing to aid the Respondents in meeting their burden of proof on this issue.

Respondents urge that I follow the BRB's decision in *Berezin v. Cascade General, Inc.*, 34 BRBS 163 (2000). In *Berezin*, the BRB held the Ninth Circuit's standard in *Bumble Bee* (requiring that precise nature, terms, and actual availability of suitable alternate jobs must be shown), is met by a showing of one specific available job opportunity, accompanied by more general evidence of the availability of similar positions. However, the single assembly position in *Berezin* was still a specifically described and available position. Since I am not crediting the alleged La Habra offer, I find that Respondents failed to identify any specific positions.

Respondents have failed to meet their burden to show the precise nature, terms, and actual availability of any job within the geographical vicinity of Mr. Vasquez's residence which he is capable of performing and which he could secure if he diligently tried. When the employer fails to carry its burden of proof in establishing the availability of suitable alternative employment, whether the complaint had diligently sought work need not be addressed. *Manigault, supra*, 22 BRBS 332. Thus, I find that Mr. Vasquez's disability is permanent and total.

B. Respondents' Petition for § 8(f) Relief

Respondents seek Special Fund relief under section 8(f) of the Act, which limits the liability of employers of workers who suffer from a previous disability. *Director, OWCP v. Cargill*, 709 F.2d 616, 618, 16 BRBS 137 (CRT) (9th Cir 1983) (en banc). Section 8(f) is invoked in situations where a work-related injury combines with a pre-existing partial disability to result in greater permanent disability than would have been caused by the injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144, 25 BRBS 85 (CRT) (9th Cir. 1991). If section 8(f) relief is available for an unscheduled injury, the employer/insurer's liability for compensation is limited to 104 weeks. After that, all compensation is paid to the claimant out of a fund established by section 44 of the Act. 33 U.S.C. § 908(f)(1).

To qualify for special fund relief, the employer bears the burden of proving four elements: (1) that the employee suffered a new injury; (2) that the employee suffered from a pre-existing partial permanent disability; (3) that the pre-existing disability was manifest to the employer prior to the new injury; and (4) that the current permanent disability is not entirely due to the new injury. *Todd Shipyards Corp. v. Director,* OWCP, 792 F.2d 1489, 19 BRBS 3(CRT) (9th Cir. 1986). There is no question that the first element is satisfied by Mr. Vasquez's back injury at SPBW in this case.

In proving that the employee had a partial permanent disability that existed prior to the injury, the employer need not show that this disability had an effect on earning capacity. *Lawson v. Suwanee Fruit & Steamship Co.*, 336 U.S. 198, 206 (1949). However, the mere existence pre-existing disability is a necessary but not sufficient prerequisite for Section 8(f) eligibility. Generally, the employer must show that, "the employee had such a serious physical disability in fact that a cautious employer would have been motivated to diskharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1145-46, 25 BRBS 85 (CRT) (9th Cir. 1991). The disability must present a "serious, lasting physical problem." *Id.*

Respondents allege that Mr. Vasquez suffered from arthritis in his low back prior to his July 1, 1998 injury. They support this with two pieces of evidence that predate the injury. On a health questionnaire filled out on May 26, 1987, under the question "List all medications you take regularly," Mr. Vasquez wrote, "Aspirin–for joint and back pain." RX 17, at p. 204. Mr. Vasquez was examined by Dr. Mark Clark in 1994 in connection with Mr. Vasquez's exposure to asbestos while working for a former employer. RX 17 at p. 199. Dr. Clark is a certified "B-Reader" – a specialist in the classification of chest x-rays for the pneumoconioses which result from exposure to asbestos or coal dust. Dr. Clark's report states that Mr. Vasquez "has had some arthritis in his back." Also relevant to determining the existence of a pre-existing disability are the post injury MRIs taken by Dr. Navabi and Dr. Delman, which show disk degeneration that is possibly unrelated to the injury and a degree of spinal degradation occurring over a three year period. RX 8, p. 41, 43.

Proof of arthritis as a pre-existing partial disability was addressed by the BRB in circumstances similar to those at hand in *Gibbs v. Newport News Shipbuilding*, 14 BRBS 954 (1982). In *Gibbs*, the claimant's treating physician made no specific diagnosis of a pre-existing arthritic condition, although he did note that post operative x-rays "showed mild degenerative changes in the right knee." *Gibbs, supra*, 14 BRBS at p. 955. To support their assertion that the claimant had arthritis at the time of his injury, the respondents offered documentary evidence in the form of notes taken by the claimant's family physician. In the notes, which were made prior to the injury, the doctor made a diagnosis of arthritis. The ALJ found these notes to be too speculative to establish a pre-existing condition. The BRB reversed this finding as not based on substantial evidence. The BRB found that absent any evidence to the contrary, the family

physician's notes, supported by the post-injury analysis of the x-ray by the treating physician,[5] were sufficient evidence to support a finding that the claimant suffered from arthritis prior to his injury.

The facts here are similar to *Gibbs*, and there is no evidence that controverts the pre-existing disability. Although the original diagnosis in this case was made in the course of evaluating another workplace injury instead of by a family physician, the evidence is still uncontroverted. Further, the evidence is supported by Mr. Vasquez's 1987 admission that he regularly takes aspirin for back and joint pain, and to a lesser degree by the post-injury MRIs which show spinal degeneration which is arguably unrelated to the workplace injury.

The third element of proving a claim under section 8(f) is that the pre-existing disability must be manifest to the employer, either actually or constructively, prior to the new injury. "It is well established that a pre-existing disability will meet the manifest requirement of Section 8(f) if prior to the subsequent injury, employer had actual knowledge of the pre-existing condition or there were medical records in existence prior to the subsequent injury from which the condition was objectively determinable." *Esposito v. Bay Container Repair Co.,* 30 BRBS 67, 68 (1996). Documentation of asymptomatic conditions that are objectively determinable may fulfill the manifest requirement, even when examination which produced the documents was undertaken for different purposes. *Currie v. Cooper Stevedoring Co.*, 23 BRBS 420, 427 (1990); *see also, Gibbs, supra,* 14 BRBS at 955. In this case, it is clear that sufficient documentation existed to give Respondents constructive notice of Mr. Vasquez's arthritic back.

Finally, Respondents bear the burden of proving that the current permanent disability is not entirely due to the new injury. If the new injury would be sufficient to leave the claimant with a total disability, the pre-existing condition is not relevant. *E.P. Paup Co. v. Director, Office of Workers Compensation Programs,* 999 F.2d 1341, 27 BRBS 41, 53 (CRT) (9th Cir. 1993); *Director, OWCP v. Luccitelli,* 964 F.2d 1303, 1305-06, 26 BRBS 1 (CRT) (2d Cir. 1992). In this case, Respondents offer no testimony or documentary evidence that directly addresses this question. They point to Dr. Smith's reports that establish that Mr. Vasquez continued to have residual back pain after the laminectomy, and that Mr. Vasquez's condition deteriorated somewhat in the three years following the surgery. The pain and continued deterioration certainly contribute to Mr. Vasquez's total disability. *Supra*, slip op. at 16. However, there is a paucity of evidence as to whether these conditions result from the workplace injury or from the pre-existing arthritis. Respondents never questioned their expert, Dr. London, on this matter. *Cf. Gibbs, supra,* 14 BRBS at p. 955 (in the absence of evidence to the contrary, the respondent's expert's testimony that preexistent arthritis made new workplace injury more severe was sufficient to show that arthritis contributed to total disability); *Greene v. J.O. Hartman Meats*, 21 BRBS 214 (1988)

[5]The BRB noted in a footnote that the analysis of the post injury x-rays was insufficient to show that the arthritis was manifest, but could be used to "add support to the opinions of the physicians who, prior to the injury, diagnosed an arthritic condition. *Gibbs, supra,* 14 BRBS at 955, fn. 1.

(proof that disk degeneration caused by aging contributed to permanent total disability established by testimony of two doctors).

Because they have presented no evidence to meet their burden of showing that the current permanent total disability is not entirely due to the new injury, the petition for relief under section 8(f) of the Act is denied.

IV. Order

It is hereby ORDERED that:

1. San Pedro Boat Works and Frank Gates Acclaim shall pay Manuel Vasquez compensation benefits for total permanent disability based on his stipulated average weekly wage of $592.10 from September 9, 2000 and continuing;

2. San Pedro Boat Works and Frank Gates Acclaim shall provide Manuel Vasquez's future medical benefits relating to his July 1, 1998 back injury;

3. San Pedro Boat Works and Frank Gates Acclaim shall pay interest on all due but unpaid compensation from due date to payment date, at the rate specified in 28 U.S.C. § 1961 on the date of the filing of this order;

4. The District Director shall make all calculations and periodic adjustments necessary to carry out this order;

5. Claimant's counsel may file and serve a fee and cost petition in compliance with 20 CFR § 702.132 within 20 days after the filing of this order. He shall thereupon diskuss the petition with opposing counsel with a view to reaching an agreement on fees and costs. No later than 15 days after the filing of the fee petition, Claimant's counsel shall file written notice of what, if any, agreements have been reached. Within 15 days thereafter, Employer's counsel shall file detailed objections to any unresolved items. Claimant's counsel may reply to the objections within 10 days.

A

ALEXANDER KARST
Administrative Law Judge